Felix Industries, Inc. *and* Salvatore Yonta. Case 2–CA–29785

June 3, 2003

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On May 17, 2000, the National Labor Relations Board issued its Decision and Order in this proceeding,[1] finding that the Respondent violated Section 8(a)(1) of the Act by discharging employee Salvatore Yonta for engaging in protected concerted activity in raising to his supervisor the issue of his alleged right to night differential pay under the applicable collective-bargaining agreement. The Board found that Yonta's use of obscenities during that conversation with his supervisor was not so opprobrious as to lose the protection of the Act.[2]

Subsequently, the Respondent filed a petition for review of the Board's Order with the United States Court of Appeals for the District of Columbia Circuit and the Board filed a cross-application for enforcement. On June 12, 2001, the court issued its decision granting the Respondent's petition for review, denying enforcement of the Board's Order, and remanding the case to the Board for further proceedings consistent with its opinion.[3]

By letter dated September 19, 2001, the Board notified the parties that it had accepted the remand and invited the parties to file statements of position. Thereafter, the Respondent and the General Counsel filed statements of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the court's remand and the parties' statements of position, and finds, as explained below, that Yonta did not lose the protection of the Act and, consequently, that his discharge was unlawful.

BACKGROUND

The relevant facts are as follows. In September 1996,[4] employee Yonta was reassigned from his day-shift schedule to work the night shift. The applicable collective-bargaining agreement provided for a night-shift differential payment, whereby an employee working that shift was paid 9 hours of pay for 8 hours of work. When Yonta received his first paycheck for working the night shift, he noticed that it did not include the contractual night differential pay.

In early October, after an inquiry by a shop steward failed to provide an answer as to why Yonta was not receiving the night-shift differential pay, Yonta telephoned Supervisor Felix Petrillo about the matter. Petrillo, who was about 25 years old at the time of these events, was the son of the Respondent's president and a supervisor of the Respondent's field operations. Yonta inquired about why he was not receiving the night differential payment. Petrillo acknowledged that he had spoken to the shop steward about this issue, but he was not sure whether Yonta was entitled to the night differential. Petrillo added that Yonta would get every penny to which he was entitled.

The conversation did not end there, however. It became increasingly hostile, as Petrillo told Yonta that he could not believe Yonta was making an issue of the night differential. Adding to the hostility, Petrillo told Yonta that he was tired of carrying him. Yonta, who was about 41 years old at the time, responded, "You're just a fucking kid. I don't have to listen to a fucking kid. Things were a lot different before you were here." Petrillo asked Yonta what he had just called him, and Yonta repeated "fucking kid." The Respondent terminated Yonta later that day.

The Board's original decision found that Yonta did not lose the protection of the Act by his use of profane language in his conversation with Petrillo, and thus his discharge violated Section 8(a)(1) of the Act. The Board applied the factors set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979), that are considered in determining whether an employee who is otherwise engaged in protected activity loses the protection of the Act by opprobrious conduct. Those four factors are (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. 245 NLRB at 816–817. The Board found that none of the factors weighed in favor of Yonta losing the protection of the Act.

The Board first found that nothing about the place of discussion, i.e., a private conversation over the telephone, weighed in favor of Yonta losing the protection of the Act. Weighing the next factor, the subject matter of the discussion, the Board found that the discussion concerned Yonta's rights under the collective-bargaining agreement, and thus constituted protected concerted activity. With regard to the third factor, the nature of the outburst, the Board found that it did not weigh in favor of losing the protection of the Act because Yonta's conduct consisted of a "brief, verbal outburst of profane language, unaccompanied by any threat or physical gestures or contact." 331 NLRB at 145. Finally, with regard to

[1] 331 NLRB 144 (2000).
[2] Id. at 146.
[3] 251 F.3d 1051 (D.C. Cir. 2001).
[4] All dates are in 1996 unless stated otherwise.

whether the conduct was provoked by an unfair labor practice, the Board found that Yonta's remarks were provoked by "hostile responses to his protected remarks, including the implicit threat that he could lose his job for engaging in protected activity." Id.[5]

The D.C. Circuit reversed the Board's finding with respect to the third *Atlantic Steel* factor, i.e., the nature of the outburst. Specifically, the court found that Yonta denounced his supervisor in "obscene, personally-denigrating, [and] insubordinate terms," and consequently the nature of his outburst counts against according him the protection of the Act. 251 F.3d at 1055. The court agreed with the Board, however, that none of the other factors counted against Yonta losing the protection of the Act.[6] Accordingly, the court remanded the case to the Board to determine whether one factor, the nature of the outburst, sufficiently outweighs the other factors so as to tip the balance in favor of Yonta losing the protection of the Act. Id.

Analysis

Having accepted the court's remand, we are bound by the law of the case established in the court's opinion. Thus, we accept as the law of the case that the third *Atlantic Steel* factor, the nature of Yonta's outburst, weighs in favor of Yonta losing the protection of the Act. The court has left open for further consideration the question of whether this factor, by itself, outweighs the other *Atlantic Steel* factors that do not weigh in favor of Yonta losing the protection of the Act. After careful consideration in light of the court's instructions on remand, we find that although the nature of Yonta's outburst must be given considerable weight towards losing the Act's protection, this one factor is insufficient to overcome the other factors weighing against Yonta losing the Act's protection.

As noted above, the court has agreed with the Board's finding that none of the three other *Atlantic Steel* factors weigh in favor of Yonta losing the protection of the Act.[7] In fact, the court's decision finds that two factors, the subject matter of the discussion and the provocation of the outburst, weigh in favor of the Act's protection. A careful examination of these factors reveals that they clearly outweigh the one factor weighing in favor of Yonta losing the Act's protection, the nature of the outburst.

With respect to the subject matter of the discussion, we find it very significant that the subject concerned Yonta's rights under the contract, and that Yonta was engaging in protected activity by initiating this discussion with Petrillo. Indeed, Petrillo's response was not a mere denial of Yonta's request for the contractual payments. If that had been the entire response, this would be a much different case. Rather, Petrillo expressed astonishment and anger that Yonta was making an "issue" of this, and then increased the level of his hostility with his statement that he was tired of "carrying" Yonta, a comment that effectively put Yonta on notice that he could be fired for having made an "issue" of his rights under the contract. Thus, at this point, the subject matter of the discussion concerned not only Yonta's rights under the collective-bargaining agreement, but also Yonta's pursuit of those rights.

With respect to the nature of the outburst, we accept the court's determination that Yonta's outburst was "obscene," "personally-denigrating" and "insubordinate," and that this factor weighs towards losing the Act's protection. However, we are also mindful of the court's instruction to determine whether this outburst is sufficient to lose the protection of the Act in these circumstances. To do so requires us to consider the fourth *Atlantic Steel* factor, the provocation by unfair labor practices. This factor provides the context in which Yonta's outburst occurred, i.e., during a protected conversation in which Yonta was provoked by Petrillo's overt hostility towards Yonta's protected conduct, including a threat of termination for engaging in protected activity. We have determined that substantial weight must be given to the circumstances that provoked Yonta's outburst. It is clear that but for Petrillo's expression of hostility towards Yonta's protected conduct, which included the threat of termination for having engaged in this protected conduct, Yonta's outburst would not have occurred. Prior to this outburst triggered by Petrillo's provocations, there is no basis to find that Yonta engaged in any inappropriate conduct in discussing the merits of his wage claim. Accordingly, when considered in this context, the nature of Yonta's outburst does not outweigh the fact that Yonta was provoked by Petrillo's extremely hostile remarks

[5] The Board added that although the General Counsel did not allege that Petrillo's comments were violative of the Act, the Board was free, under *Atlantic Steel*, to consider conduct that would have been found to be an unfair labor practice had it been so alleged.

[6] The court read the Board's decision as finding that the first factor, the place of the discussion, weighed neither in favor of protection nor against it. The court found that the other two factors, the subject matter of the discussion and the provocation by an unfair labor practice, were properly weighed in favor of the Act's protection.

[7] We accept, as part of its remand, the court's finding that the Board's original decision implicitly found that the first *Atlantic Steel* factor, the place of the discussion, weighs neither in favor of nor against Yonta losing the protection of the Act.

about the protected activity in which Yonta was currently engaged.[8]

In arguing that Yonta lost the protection of the Act, our dissenting colleague contends that Petrillo's comments were not so provocative as to cause Yonta to utter the profane comments. Our colleague relies in particular on the fact that Petrillo asked Yonta what he had just called him, and that Yonta responded by repeating "fucking kid." In our view, our colleague places too much significance on this last part of the conversation and fails to recognize that Petrillo's comments were increasingly hostile and provocative. First, Petrillo questioned the validity of Yonta's claim. He next expressed outrage at the fact that Yonta was pursuing a contractual right. Petrillo followed these comments with the statement that he was "tired of carrying him," effectively a threat to discharge Yonta for engaging in protected activity. That statement triggered Yonta's outburst. The record contains no evidence that Yonta had ever been informed before this conversation that he was being "carried" or that his work was deficient in any manner. Accordingly, this sudden pronouncement by Petrillo, bearing on Yonta's worth as an employee, was not only a threat of discharge, but was "personally-denigrating," to Yonta. And, rather than taking any steps to calm the situation, Petrillo exacerbated the situation by immediately daring Yonta, in the heat of his anger, to repeat his profane comment. Having considered the full context of Petrillo's comments, we cannot agree with our colleague that Petrillo did not make highly provocative remarks in this conversation.

In sum, although the nature of Yonta's outburst weighs in favor of losing the protection of the Act, it does not outweigh the factors favoring the protections accorded to him under the Act. Accordingly, we find that Yonta did not lose the protection of the Act during his conversation with Petrillo, and that his discharge violated Section 8(a)(1) as alleged.

ORDER

The National Labor Relations Board reaffirms the Board's original Order reported at 331 NLRB 144 (2000), and orders that the Respondent, Felix Industries, Inc., Lincolndale, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

CHAIRMAN BATTISTA, dissenting.

Contrary to my colleagues, I find that employee Salvatore Yonta lost the protection of the Act based on his obscene outburst at his supervisor during their telephone conversation. Accordingly, I find that the Respondent's discharge of Yonta did not violate Section 8(a)(1) of the Act.

The facts are not in dispute. In October 1996, Yonta telephoned Supervisor Felix Petrillo with a question about whether he was entitled to night differential pay under the collective-bargaining agreement. Petrillo, who supervised 250 of the Respondent's employees, explained that he was not sure whether Yonta was entitled to the extra pay, but assured Yonta that he would get every penny to which he was entitled. As the conversation ensued, Petrillo expressed his surprise that Yonta had made an issue of this, because the Respondent had never cheated any of its employees. He also told Yonta that he was tired of "carrying" him. At this point, Yonta engaged in an outburst laced with profanity. He called his supervisor a "fucking kid." In fact, he uttered that expression three times.

The D.C. Circuit found that Yonta's outburst was "obscene," "personally degrading," and "insubordinate." Applying the *Atlantic Steel*[1] test, the court held that the Board erred in not finding that one of the factors to be considered, the nature of the outburst, weighed in favor of Yonta losing the protection of the Act. The court also accepted the Board's decision insofar as it found that two factors, the subject matter of the conversation and the provocation by unfair labor practices, weighed in favor of the Act's protection. Left for consideration on remand is the question of whether the weight given to Yonta's outburst is greater than that given to the other two factors.[2]

In my view, Yonta's outburst constitutes outrageous conduct, and outweighs the other factors.

Plainly, Yonta's outburst consisted of nothing short of egregious misconduct. His use of profanity here was no slip of the tongue; he called his supervisor a "fucking kid" three times. Significantly, and to his credit, Petrillo gave Yonta the opportunity to back away from these outrageous comments after the second time Yonta used

[8] In finding that the nature of Yonta's outburst outweighs the *Atlantic Steel* factors that lean in Yonta's favor, the dissent relies—in addition to Yonta's profane remarks—on Yonta's statement that he did not have to listen to Petrillo. Contrary to the dissent, we find, in view of Petrillo's provocative remarks and the fact that the exchange occurred in the heat of a dispute over compliance with a collective-bargaining agreement in which tempers can understandably flare, that this statement by Yonta—standing alone—is only mildly insubordinate. In any event, it does not raise the nature of Yonta's outburst to a level that outweighs the other factors leaning in Yonta's favor.

[1] 245 NLRB 814 (1979).

[2] A fourth factor (place of conversation) was regarded as militating neither in favor of, nor against, protection.

this expression. He asked Yonta what he had just called him. Rather than backing off, however, Yonta took this opportunity to continue his outrageous behavior, and once again called Petrillo a "fucking kid."

Further, Yonta's outburst amounted to a substantial attack on the authority of a high-ranking official, viz. the supervisor of the 250 employees in Respondent's field operation. In addition, Yonta was insubordinate. He said that he did not have to listen to Petrillo. Clearly, a high-ranking supervisor need not tolerate such abusive, obscene, and insubordinate conduct.

With respect to the two *Atlantic Steel* factors that have been found to weigh in Yonta's favor, any such weight is insufficient to overcome the substantial weight attributed to the nature of Yonta's outburst. Thus, with respect to the subject matter of the conversation, I note that in response to Yonta's inquiry, Petrillo did not reject Yonta's claim for the night differential pay. Rather, Petrillo merely said that he did not yet have a definitive answer to Yonta's question, and he attempted to alleviate Yonta's concern by assuring him that he would get every penny to which he was entitled. In these circumstances, the weight of this factor is not as considerable as it would be in a genuine labor-management dispute, where the Board has recognized that tempers can flare.[3]

With respect to the factor regarding the provocation by an unfair labor practice, I find that this factor carries little weight as well. I recognize that the court affirmed the Board's earlier finding that Petrillo's remark about "carrying" Yonta amounted to a threat of termination. It was, however, an implicit threat at best. In fact, the General Counsel did not even allege that the statement violated Section 8(a)(1).

My colleagues assert that Petrillo's remark was "personally-denigrating" to Yonta. Of course, the court used that phrase to refer to Yonta's remarks to Petrillo, not the other way around. In addition, if, as my colleagues suggest, Petrillo's remark was "personally degrading" because it responded to Yonta's "worth as an employee," it was a reference to Yonta's work performance and not to any protected activity.

The other remark at issue, Petrillo's comment that he could not believe that Yonta was making an issue of this, was simply reflective of Petrillo's stated belief that he had never cheated anyone and would not do so here. The remark was hardly provocative.

My colleagues have nevertheless attached substantial weight to Petrillo's comments. They contend that, but for Petrillo's comments, Yonta's outburst would have never occurred. Their argument fails to recognize that even if Yonta was angered by Petrillo's comments, those comments were neither so threatening nor so provocative as to anger Yonta to the point where he would lose all control, as he did here.

Further, it is highly significant that the third time Yonta uttered the phrase "fucking kid," it was not in response to Petrillo's comments. Rather, it came in response to Petrillo's question as to what Yonta had just said to him. Certainly, that question by Petrillo cannot be construed as a threat of any kind. If anything, it provided Yonta with an opportunity to back away from or retract his obscene comments, and Yonta failed to take advantage of this opportunity. Instead, he seized this opportunity to continue uttering obscene comments at his supervisor. Consequently, I find that the provocation here was minimal at best and did not cause Yonta's reaction.

In sum, an analysis of the *Atlantic Steel* factors shows that Yonta engaged in outrageous misconduct and that the nature of his outburst weighs heavily towards Yonta losing the protection of the Act. Although two *Atlantic Steel* factors—the subject matter of the discussion and the provocation by unfair labor practices—have been found to weigh in favor of the Act's protection, they are insufficient to overcome the substantial weight given to Yonta's outburst. Accordingly, I find that a proper balance of these factors demonstrates that Yonta lost the protection of the Act by engaging in outrageous conduct. Consequently, his discharge did not violate Section 8(a)(1) of the Act.

[3] See, for example, *Thor Power Tool Co.*, 148 NLRB 1379 (1964), enfd. 351 F.2d 584 (7th Cir. 1965); *Firch Baking Co.*, 232 NLRB 772 (1977).